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No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense, *et al*,
Petitioner,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., *et al*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

The enclosed brief of *Amicus Curiae* American Civil Rights Union in support of petitioners was filed with the Court on July 25, 2005, apparently past the deadline for filing by a few days. The delay was caused by an erroneous miscommunication regarding the date of the Petitioners' filing. All parties have consented to the filing of this brief, with the letters of consent attached to the Certificate of Service filed with the brief. None have been prejudiced. Therefore, *Amicus Curiae* American Civil Rights Union requests leave to file this brief out of time.

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BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS*[*]

The American Civil Rights Union (ACRU) was established in 1998 as a Section 501©)(3) educational and legal charity dedicated to basic constitutional issues. Its purpose, as stated on its Internet webpage, is to advance civil rights because "Civil rights are the fundamental liberties that all Americans should enjoy as a matter of basic morality, as well as constitutional protection."

[*] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the ACRU and is authored entirely by counsel for the ACRU. In accord with the Rules of the Court, letters of consent from the parties are being lodged herewith.

The Policy Board of the ACRU consists of: Hon. Robert B. Carleson, Chairman; Hon. Edwin Meese, III; Judge Robert Bork; Hon. Linda Chavez (Emerita); Mr. Joseph Perkins; Hon. William Bradford Reynolds; Professor James Q. Wilson; Ambassador Curtin Winsor, Jr.; Dean J. Clayburn LaForce; Professor Walter Williams; and Hon. Ken Tomlinson (Emeritus).

The interest of the ACRU in this case is two-fold. The interest of the amicus in the First Amendment freedoms of speech and association were demonstrated in its brief for the Petitioners in *Boy Scouts of America v. Dale*, 530 US 640 (2000). Its interest in the present case is its concern that the First Amendment and this Court's conclusions in the *Dale* have been misinterpreted and misapplied here, by the Circuit Court.

The other interest of the amicus in this case is that other, equally important provisions of the Constitution have been given short shrift by the majority of the Circuit Court panel. As the dissenting judge there noted, the public safety of citizens of the United States are at risk now. The War Powers provisions of the Constitution and related military provisions of the US Code are implicated seriously when a court undertakes to instruct the military how it much conduct the recruitment of its (all voluntary) personnel, in time of war.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court stated the question presented as "whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement."

As the court below noted, and so has this Court in prior cases, jurisdiction is basic and can be addresses at any level

where its absence can be shown. So the ACRU addresses that question first.

Beyond that, there are several different approaches to the single question the court posed. The amicus suggests that the court below has misstated and over-applied the First Amendment in this case, and at the same time has given too little consideration to two established lines of cases, one on the use of the Spending Power by Congress in legislation, and the other, the application of constitutional powers and code provisions concerning the establishment and conduct of the American military.

I. DOES THIS COURT HAVE SUBJECT MATTER JURISDICTION TO DECIDE THIS CASE ON THE ISSUE RAISED BY THE PLAINTIFFS AT TRIAL, RESPONDENTS HERE?

Although jurisdiction is not part of the Question Presented in the grant of Certiorari in this case, jurisdiction is always basic and can be raised at any level. Not even agreement between the parties that jurisdiction existed below, can absolve this Court from considering whether jurisdiction exists in the case and therefore that this Court can proceed with the case.

Note the case of *Elk Grove Unified School District v. Newdow*, __ US __, Case No. 02-1624, decided 14 June, 2004. Although both courts below had found they had jurisdiction in the matter, and although this Court agreed with them (and with the media and the public) that the issue presented was important and continuing, this Court found there was a lack of jurisdiction in that case, and remanded with instructions to dismiss. A similar logic applies here.

More than half of the trial court decision in this case was dedicated to standing, ultimately concluding that the Forum for Academic and Institutional Rights, Inc., and its associates

(collectively called "FAIR" hereafter) did have standing. A significant part of the Court of Appeals decision likewise discussed that subject. While there clearly is personal jurisdiction, in that FAIR can claim to represent law schools generally, that answers only half of the question.

The Opinion of the Court of Appeals, below, recognized that it did not base its finding of jurisdiction on anything but the corporate representative, FAIR, Inc. The court said in footnote 7, "While the government does not concede that the non-FAIR plaintiffs had standing, the presence of one plaintiff with standing is sufficient to satisfy that requirement." [Citation omitted.]

This Court has been quite clear over the years that jurisdiction is not conferred by the claim of an undifferentiated interest in the public policy the parties seek to challenge. Instead, a party must allege and establish some "specific injury" above and beyond the complaint of an average citizen and/or taxpayer. The most thorough reviews of the boundaries between mere citizen interests and cognizable standing have occurred in Sierra Club cases, including *Ohio Forestry Association, Inc. v. Sierra Club*, 523 US 726 (1998), and cases there cited.

There is no allegation in either of the lower court decisions in this case that a single individual joining this case as an individual or represented by any of the group or organizational parties to this case, has suffered any "specific injury." There is no allegation that any individual involved directly or indirectly in this case is now, or ever was, a member of the military or would-be member of the military who was harmed by the application of the "Don't ask; don't tell" policy of the American military.

To make up for this critical lack, FAIR claims that it has suffered specific harm because its associated law schools "have been forced to change their non-discrimination poli-

cies" due to the application of the Solomon Amendment. However, the record does not reflect that the federal government ever asked for or sought any alteration in the policies of the law schools. If the schools did abrogate their policies, this was on their own hook and not due to any actions by the federal government. To allow the law schools to claim subject matter jurisdiction because they shot themselves in the foot is not a legitimate basis for a finding of standing.

The law schools did have the alternative of challenging the military policy directly in court on behalf of interested and affected parties. Precisely such a case is going to trial in US District Court in Massachusetts as this brief is being written. On 6 July, 2005, hearings will begin in Boston in the case filed by the Servicemembers Legal Defense Network, which claims to represent individuals who were/are directly and specifically harmed by the military recruitment policies supposedly at issue, here. The Internet citation on this coming hearing is: http://www.cnsnews.com//ViewNation.asp?Page=\Nation\archive\200506\NAT20050606a.html

In short, there is a serious question whether any Plaintiff or Respondent in this case satisfies the requirements of subject matter jurisdiction over the military recruitment issue they seek to challenge here. If the Court is satisfied that standing is lacking, it should dismiss this case for want of jurisdiction, as it did in *Newdow, supra*.

II. DID THE COURT OF APPEALS ERR BY TREATING THIS AS A FIRST AMENDMENT CASE, RATHER THAN RECOGNIZING THAT IT IS, IN FACT, A SPENDING POWERS CASE?

The Circuit Court below seeks to dispense with this subject in a footnote. It claims in footnote 9 that in certain cases involving library finding, the government was not barring existing spending, but conditioning future spending on set conditions. The court there wrote, "That exception does not

apply in our case because the Solomon Amendment does not create a spending program; it merely imposes a penalty—the loss of general funds."

The history of Spending Power cases demonstrates, however, that the distinction the court below sought to draw is totally irrelevant.

The leading case on this subject is *South Dakota v. Dole*, 483 U.S. 203 (1987). That case upheld a federal law to withhold federal highway funds from any state which failed to establish a minimum drinking age of 21 years old. The federal highway funds came from the Interstate program, in part, which dated back to the Eisenhower Administration. This Court found no legal relevance in the age of the spending program at issue. Instead, it found four criteria to decide whether a congressional restriction was constitutional, when connected to a federal funding program for the states.

These four criteria were reapplied in *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*,. 493 US 1070 (1990). The *Nevada* case involved the conditioning of federal highway funds on the states' establishing maximum speed limits on their highways of 55 MPH. The reasons stated for this action by Congress were reduction in foreign oil needs and reduction in highway fatalities.

By the time of the *Nevada* case, the issue of spending restrictions was so clear that this Court did not even take the case. It declined certiorari, and left standing the lower court decision upholding the federal law. However, the lower court in *Nevada* repeated and applied the four criteria established by this Court in *Dole*. They are:

> First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" And in doing that, the Court should "defer substantially" to the judgment of Congress.

> Second, Congress must act "unambiguously" so the states can "exercise their choice knowingly, cognizant of the consequences of their participation."
>
> Third, the restrictions placed on federal funds must be related "to the federal interest in particular national projects or programs."
>
> Fourth, "other constitutional provisions may [NOT] provide an independent bar to the conditional grant of federal funds." As the Court explained, the Spending Power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." As this Court concluded in *Nevada, supra*, "Here, as in *Dole*, if the State were "to succumb to the blandishments offered by Congress * * *, the State's action in so doing would not violate the constitutional rights of anyone." [Citing *South Dakota v. Dole, supra*, at page 211.

With both the drinking age requirement and the (since repealed) 55 MPH requirement, Congress was attaching a condition to the states' receipt of long-established federal highway funds. So, the distinction the court below sought to draw in Spending Power cases is wrong.

This same conclusion, that Congress can "encourage" states to act or not act in certain ways, by attaching conditions to the grants of federal aid, is most recently confirmed in *New York v. United States*, 505 U.S. 144 (1992). While this case concerned a more invasive effort by Congress, to cause the states to enact provisions for the storage of low-level nuclear waste, it approved as a lesser and permitted action the conditioning of federal fund grants as in the prior cases and as in the current case.

All of these prior cases concerned effects of federal funding conditions on state governments. These faced different and higher barriers in that states are (apparently) protected by the Tenth Amendment, whereas the law schools

at issue here are not cloaked by any suggested form of governmental immunity.

The opposite bookend of Spending Power cases is *Grove City College v. Bell*, 465 U.S. 555 (1984). In that seminal case, this Court dealt with the claim by the federal government that the nondiscrimination provisions of Title IX of the Educational Amendments of 1972 should apply to Grove City. The College defended on the basis that it did not accept any federal funds which would trigger the enforcement of the Title.

The Court ruled in favor of the College, in a complex series of decisions. Justice White wrote the Opinion, joined by Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist and O'Connor. Justices Brennan, Marshall and Stevens joined in all but Part III. Justice Powell filed a Concurrence, joined by the Chief Justice and Justice O'Connor. Justice Stevens filed a Concurrence in Part and Concurrence in the Result. Justice Brennan filed a Concurrence in Part and Dissent in Part, joined by Justice Marshall.

Cutting through the thicket to the basics, Grove City College did not accept any direct aid from the federal government. As the Opinion noted at footnote 3, this was a deliberate choice by the College. "Grove City's desire to avoid federal oversight has led it to decline to participate, not only in direct institutional aid programs, but also in federal student assistance programs under which the College would be required to assess students' eligibility and to determine the amounts of loans, work-study funds, or grants they should receive."

However, the College did enroll some students who were entitled to receive "Basic Educational Opportunity Grants (BEOG's)" from the Department of Education. The College argued that these were not "direct aid" to the College because they were not payable to the College. They were payable to

the students at their initiative to assist them with their college expenses regardless of what college they might attend.

The Court concluded that the BEOG grants did amount to federal aid, but only to its scholarship programs, not university-wide, including in sports programs.

The reason for this extended discussion of this elderly (but still applicable) decision is in its final paragraph. The last argument of the College was that the federal government, in requiring the College to comply with certain requirements on actions and documents to be filed.

> Grove City's final challenge to the Court of Appeals' decision—that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students—warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. . . . Grove City may terminate its participation in the BEOG program and thus avoid the requirements of 901(a). Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance. Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students. [Citations omitted.]

Applying the same logic to the present case, the law schools here are immediately free of the military recruitment provisions that they claim are so onerous by declining the federal aid to which that provision is attached.

Surely it is human nature to prefer to receive money without complying with the contractual obligations that come with the money. The schools of law would obviously have healthier balance sheets if they did not have to provide to all

students the education for which they paid. Likewise, the schools would benefit if they could reduce their faculty costs by not paying some of their professors. And what if these law schools could invest their endowments as they chose, but then ignore the terms of those investments by requiring all brokerages to cover any losses that might occasionally occur.

In short, the position of these law schools is essentially unworthy of the logical thought one would expect from law school faculties and staff. Were they aware of the conditions established by Congress when they accepted the money? Yes, they were.

Knowing that, did they accept the money? Yes, they did.

Did they know they could have avoided the requirements of the Solomon Amendment by refusing to accept federal aid after the date of that Amendment? Yes, they knew that.

The conclusion seems inescapable that the Respondents here simply want to welsh on a deal that they fully understood at the time they entered into it. The experienced litigators (and professors) for FAIR certainly were aware of the *Grove City College* case from day one. And under that case, the Respondents are not entitled to relief.

III. DID THE COURT OF APPEALS ERR BY CONCLUDING THAT THE RESPONDENTS SUFFERED ANY ACTIONABLE HARM IN THIS CASE WHICH CAN OVERBALANCE THE HARM TO THE US MILITARY?

As noted in the previous section, the harm allegedly done to the Respondents in this case is self-inflicted. Like Sheriff Bart (Clevon Little) in the satiric movie, *Blazing Saddles*, they have put a gun under their own chin, and then sought a sympathetic response in return. But the other side of the harm equation is only slightly explored in the court below.

The Opinion of the Court of Appeals pays no attention to the fact that military recruitment is the specific governmental activity which would be curtailed by the court's decision. The Dissent at least raises this point. But neither opinion noted that this is military recruitment of an all-volunteer military, during wartime.

Congress has the power to declare war. Constitution, Article I, Section 8, clause 11. Once war has been declared, the conduct of that war is in the hands of the President as Commander in Chief. Constitution, Article II, Section 2, clause 1. The Dissent in the Circuit Court notes, at the beginning of Section II of its slip opinion, all of the constitutional provisions concerning the financing and conduct of war.

Not even the Dissent, however, notes this extremely important fact: The United States has been at war, and relying on a volunteer military, at all times relevant to this case.

Senate Joint Resolution 23 was adopted on 18 September, 2005. Its operative language is, "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Congress left no doubt that it was exercising its War Powers by stating that its action was "[c]onsistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." It is not by accident that Congress in 2001, and again a year later, used almost identical language to what Congress used in 1805 to authorize

President Jefferson to pursue the Barbary Pirates "as necessary" across international boundaries. That was the only other instance where a Declaration of War by Congress did not name one or more nations as the object of the Declaration. The text of SJR 23 is found on Yale University's Avalon Project at this address: http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm

For those who argue that an "Authorization to Use Military Force" is not a true declaration of war, there are two answers. The first is that the Constitution does not specify any particular language for a declaration of war. But the other reason is that some of the hundreds of people who wrote and ratified the Constitution were present in the federal government when Congress authorized war against the Barbary Pirates. If the people who wrote the Constitution considered the 1805 Resolution an adequate and constitutional declaration, then a duplicate of that is adequate today, against the latest threat from outlaw terrorists.

SJR 23 was enrolled as Public Law No: 107-40, after it was signed by the President on 18 September, 2005. Under the Constitution, however, only a Joint Resolution by the Houses of Congress is required. Any signature or other action by the President is legally surplusage.

Both the actions of Congress in financing or approving military action, and the actions of a President in directing military actions, is entitled to a relatively high deference from the courts in any legal examination. This is true even when there is no declared state of war. See, *Campbell v. Clinton*, 203 F.3rd 19 (D.C. Cir. 2000), cert. denied 121 S. Ct 50 (2000), which concerned certain military actions by the United States in the former Yugoslavia.

Such judicial deference is even more important in times of declared war. See this Court's unanimous decision in, *In Re Quirin*, 317 US 1 (1942).

The granting of a preliminary injunction is the precise question in this case. When it is noted that the Respondents suffered no injury whatever (other than self-inflicted), and that the damage to the Petitioners is an impairment of the military in time of declared war, the balancing of the equities comes out the opposite of the conclusion of the court below. The injunction should have been denied.

IV. DID THE COURT OF APPEALS ERR IN OTHER WAYS WHOSE CUMULATIVE EFFECT IS THAT ITS JUDGMENT SHOULD BE REVERSED AND REMANDED?

There are a number of smaller errors by the court below which lead cumulatively to the conclusion that it is in error. Those are discussed here, in roughly their order of importance.

The Dissent below notes but does not discuss a question of choice of legal tactics by FAIR in this case. The instant case seeks a First Amendment ruling against the policies of the military concerning homosexuals. But this precise issue has already been litigated and decided in seven Courts of Appeal, and this precise question will surely arrive in this Court in due course. The Dissent writes, "it bears note that the military's policy against homosexual activity . . . previously has been adjudged by a number of our sister courts of appeal not to violate the Constitution. . . ." [Citations omitted. Slip opinion at p. 72.]

What the Dissent does not note, but this Court should, is the radical difference between the approach of all federal courts to First Amendment issues, as opposed to their approach to military discipline issues. In the latter cases, the courts have long recognized that judges are particularly ill-equipped to direct or control specific decisions concerning the conduct of the American military. In the former cases, federal courts defer to no one and no institution in their

judgments on what does, or does not, involve a violation of First Amendment rights.

Comparing these two lines of cases suggests that FAIR and its allies and counsel have simply sought to construct a case and an argument to turn a military discipline issue (already being litigated and headed for this Court) into a First Amendment case. And this result-oriented approach is designed to create a legal victory in a subject which has already been lost in two-thirds of the Circuit Courts.

The Dissent below approaches this subject when it writes with personal candor,

> What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought to the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice.

The Court of Appeals below inferentially recognizes that FAIR and its allies may have engaged not in forum shopping, but in issue shopping. It writes in footnote 27, "We note that this is not a case involving military discretion to determine whether internal policies are necessary and appropriate. . . ." [Citation omitted.] The entire thrust of this case is against the military's recruitment policies concerning homosexuals, and unless one has been living under a rock, one knows that this has been a public policy issue since the first days of the Clinton Administration.

The court below reveals perhaps too much of its thinking when it writes,

> But it does not follow that recruiting by means of the Solomon Amendment is effective. On the contrary, it seems to us equally plausible that the Solomon Amendment has in fact hampered recruitment by

> subjecting the military's exclusionary policy to public scrutiny. (Slip Opinion, at p. 60.)

The ACRU suggests that the lower court revealed by that comment the real basis for its decision. It considers the Solomon Amendment to be a self-defeating policy error, and wants to dispense with it. But deciding what public policies are desirable, and whether they are effective and should be continued, is not a *judicial* function. That is a *legislative* function, which with respect to the military is in the hands of Congress.

The next error is one of particular interest to the ACRU. This amicus participated in, and supported this Court's ultimate decision in *Boy Scouts of America v. Dale*, 530 US 640 (2000). The principles of that case are badly abused by the Opinion of the Circuit Court below.

Dale confirmed the "freedom of association" as a basic right of the Boy Scouts under the First Amendment. The court below concluded that the freedom of association of the law schools here was violated by the "requirement" that military recruiters have equal access to the campuses, etc., and that the schools were "forced to associate" with the message of the military.

This analysis is wrong at both ends of the equation. First, there is no "requirement" that the military recruiters have access to the law school campuses. As noted in the Spending Power analysis, above, the schools are entirely free to refuse access to the recruiters, so long as they choose not to accept the hundreds of millions of dollars in federal aid to themselves and their universities.

The other error, however, is to claim that the schools are "associated" with the views of the military. The decisions of the lower courts (all that is available to this amicus as this brief is written) do not include a list of the businesses and institutions which regularly recruit for potential employees at

these law schools. This Court can take judicial notice of the fact that significant numbers of graduating lawyers do not go into the practice of law, but instead go into the business, corporate, charitable and academic positions, where their training can still be well applied.

The ACRU suggests that an examination of the lists of all recruiters who have come to these law school campuses during the pendency of this litigation will probably include all major corporations in the United States. And that means corporations which were "major" at the time, regardless of their subsequent business fates. In short, if the lists go back far enough, such collapsed giants as Enron, World Com, and Arthur Andersen will probably appear.

By definition, the law schools have no more or less "association" with these corporate recruiters, than with the military recruiters. Does that mean that these law schools are sending the message that they are in favor of what these corporations have done—massive corporate fraud? Massive document shredding? (Yes, the recent reversal of the criminal convictions of Andersen are noted. But are these law schools teaching their students that when trouble looms on the corporate horizon, they should run the shredders until the motors burn out?)

The legal approach taken by FAIR to the association of law schools and recruiters entirely (and perhaps deliberately) misses the point. The law schools are not associated in a First Amendment sense with any recruiters, including the military ones. The only true association, in the *Dale* sense of the word, occurs when individual students at those schools choose to accept employment opportunities as offered.

There is no suggestion in this record that any graduate of any of the law schools present in this case has been forced to accept any association that he/she finds unacceptable. In fact, the whole point of the process is to present students about to graduate with the widest possible list of opportunities in

salary, working conditions, job satisfaction, so that each can make his/her best possible choice. There is a "freedom of association" violation in curtailing this process, which is what FAIR seeks and the court below did. But there is no such violation in permitting this process to continue, as provided in the Solomon Amendment.

The third general error of the Circuit Court below was to presume that the law schools were being forced to adopt a political judgment they disagreed with, and with no opportunity to object. Again, both ends of this logical analysis are wrong.

As pointed out in the Spending Power analysis, above, the law schools are not being "forced" to say or do anything. They are in their current posture because they choose to accept millions of dollars in taxpayer money, provided by Congress subject to certain conditions. But at the other end of that logical analysis, the law schools remain free to say what they choose to about military recruiting, through their faculty, staff and students, in speaking or in print, as they choose.

The position of the law schools is no different than that of airports, shopping malls, etc., which have found themselves obligated to allow on their premises (in limited forms) spokesmen for various causes that the management wished to disassociate from. Such situations are routinely handled by published or posted disclaimers which make clear that the views of the speakers are not those of the management of the premises.

The law schools here advance no reason why the same sort of caveats might not save them from any inference that they accepted the "messages" of the military. This case is not about freedom of speech, it is about hostility to the American military. The First Amendment does, of course, protect every law school dean, professor, and student who harbors that hostility. But it does not protect the law schools as corporate entities when they seek to enforce that majoritarian (but

not universal) view in violation of clear federal law to the contrary.

CONCLUSION

The courts below found that jurisdiction existed, without examining whether any Plaintiff below, Respondent here, suffered any personal injury which would justify any remedy from the courts. If this Court agrees with that analysis, the decision of the Circuit Court should be reversed and remanded, with instructions to dismiss for want of jurisdiction.

The other defects that the American Civil Rights Union perceives in the decisions below all have to do with the respective harm to the two sides in this case, and the balancing of the equities. Especially when the Respondents are the leaders of the American military, who are conducting military actions with an all-volunteer force in a time of declared war, it should be clear that the Circuit Court did not properly weigh the competing interests, to reach the conclusion that it did.

Wherefore, the ACRU urges the Court either to reverse and remand the case with instructions to dismiss for want of jurisdiction, or to reverse and remand with instructions to reconsider based on factors concerning the harm to the respective parties in this case, which were not considered, or not adequately considered, on trial and appellate review to date.

Respectfully Submitted,

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